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SUPREME COURT, U.S.

NO. 81-5919

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDWARD HAROLD SCHAD, JR.,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Assuming, without conceding, that petitioner presents a bona fide confrontation claim, did the Arizona trial court violate petitioner's right to confrontation by admitting certain testimony adduced at the voluntariness hearing, where petitioner had sufficient opportunity and motivation to develope the testimony he later wished to adduce at trial?

2. Were petitioner's fourth amendment rights violated when law enforcement officers searched the car that petitioner had stolen from Leroy Grove?

3. Did the Arizona Supreme Court disallow consideration of potentially mitigating evidence, or did it merely agree with the trial court when it held that the evidence presented, when duly considered, did not constitute a mitigating circumstance?

4. Did the Arizona courts fail to consider evidence and arguments relating to petitioner's prior conviction, which conviction led to the finding of two aggravating circumstances by the trial court?

5. Did the Arizona Supreme Court violate petitioner's rights under the ex post facto clause of the United States Constitution when it 1) declared that one portion of the Arizona death penalty statute, which violated the mandates of Lockett v. Ohio, was severable from the remainder of the statute, and 2) held that petitioner was, in fact, subject to a constitutionally valid death penalty statute?

STATEMENT OF THE CASE

On August 9, 1978, the body of 74 year-old Lorimer "Leroy" Grove, a resident of Bisbee, Arizona, was found 9 miles south of Prescott, Arizona. From the the cord around what was left of the victim's neck, the medical examiner concluded that the killing was accomplished by means of strangulation.

Almost a month after this discovery, Petitioner Edward Harold Schad was arrested in Salt Lake City, Utah. At that time, petitioner was driving Mr. Grove's Cadillac. Between the time when he took the car and the time of his arrest, petitioner put several thousand miles on the car. He paid for gasoline with the victim's credit cards. Between his arrest and trial, petitioner told several highly inconsistent stories regarding how he came into possession of the victim's vehicle.

Petitioner was charged with first-degree murder in the death of Leroy Grove. The jury, following a 2-week trial, convicted petitioner of that crime. After considering the aggravating evidence adduced by the state, and the mitigating evidence offered by petitioner, the trial court sentenced petitioner to death. Petitioner appealed his conviction and sentence to the Arizona Supreme Court. That court, after considering lengthy written briefs, and hearing oral argument, affirmed petitioner's judgment and sentence on July 13, 1981. Petitioner's motion for rehearing was denied on September 10, 1981. Ninety-six days later, he filed the instant petition for writ of certiorari.

JURISDICTION

Petitioner cites Rule 20, Rules of the Supreme Court of the United States, and several cases decided by this Court

in support of his contention that, while his petition is untimely, the defect is not jurisdictional and does not prevent this Court from considering the petition. However, it appears that the cases cited by petitioner, i.e. Durham v. United States, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200 (1971), and Taglianetti v. United States, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969), were decided pursuant to former Rule 22, not Rule 20. Rule 20, which is somewhat different from former Rule 22, implies that untimely filing may, in fact, constitute a jurisdictional defect. Rule 20.3 provides as follows:

> The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Rule 20.1 provides that a 30-day extension may be obtained when good cause is shown. It does not appear that petitioner ever sought, much less secured, such an extension.

For these reasons, respondents respectfully request this Court to dismiss the petition for writ of certiorari for the reason that it was not filed in a timely fashion.

ARGUMENTS

I

THE ARIZONA TRIAL COURT DID NOT VIOLATE PETITIONER'S RIGHT TO CONFRONT WITNESSES AGAINST HIM.

Petitioner contends that the Arizona trial court violated his right of confrontation when it admitted testimony given at the suppression hearing by Kent Jones, petitioner's former parole officer. Respondent disagrees with petitioner's factual and legal analysis of this issue. Respondent takes the position that petitioner mischaracterizes this claim when he labels it a

"confrontation" issue. The simple fact is that appellant failed to attempt to obtain Jones' presence at trial. In order for this Court to understand respondent's approach to this claim, certain background information is essential.

On September 21, 1979, the state made a motion to continue petitioner's trial because Kent Jones had recently been involved in a bad accident. Jones had already testified at the hearing on petitioner's motion to determine the voluntariness of certain statements that petitioner had made. Petitioner's counsel, while expressing sympathy for the state's position, objected to the motion. The specific legal basis for his objection was petitioner's constitutional right to a speedy trial. Petitioner's counsel was aware that the only alternative to continuing the matter was to use the transcript from Jones' suppression hearing testimony; nevertheless, he opposed that alternative as well. On September 25, 1979, the state reasserted its motion to continue. Petitioner withdrew his objection to the motion. The state pointed out to petitioner's counsel that, because of the trial court's ruling regarding the inadmissibility of any evidence with respect to petitioner's parole status, any testimony related to that status would have to be introduced during the defense case. Petitioner's counsel agreed with that assertion. The trial court denied the motion to continue, invoking petitioner's right to a speedy trial. The file does not suggest that petitioner ever attempted to place Jones under subpoena.

In admitting Jones' prior testimony, the trial court relied upon Rule 804(B)(1), Arizona Rules of Evidence. That rule provides as follows:

> The following are not excluded by the hearsay rule if the declarent is unavailable as a witness:
>
> 1. Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party againt whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develope the testimony by direct, cross, or redirect examination.

It is undisputed that Jones was not available for trial. Even if this Court concludes that this is a legitimate confrontation question, in spite of the fact that Jones should have been subpoenaed by petitioner, the former testimony was admissible under the above rule. Furthermore, its admission did not violate this Court's pronouncements in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Respondent concedes that the "issue" in a voluntariness hearing, as was held prior to trial in this case, is not identical to the ultimate issue at trial, i.e. the guilt or innocence of the defendant. However, the labels that are attached to these issues should not be, and are not, determinative of this question. More significant is the question whether the party who opposes the introduction of the former testimony at trial had sufficient opportunity and motive to develop the testimony at the prior hearing. United States v. Atkins, 618 F.2d 366 (9th Cir. 1980); United States v. Zurosky, 614 F.2d 779 (1st Cir. 1979) cert. denied, 446 U.S. 967 (1980). Petitioner claims that he wanted to cross-examine Jones at trial regarding the fact that petitioner was thought to be a "snitch" at the Utah State Penitentiary. This, according to petitioner, would have bolstered the credibility of his trial testimony

with respect to his explanation regarding why he made one of several inconsistent statements about his possession of Leroy Grove's car. As the Arizona Supreme Court pointed out, this line of questioning was relevant to the issues before the trial court at the voluntariness hearing. Petitioner had opportunity and similar motive to develop the testimony in question during the voluntariness hearing; therefore, his right of confrontation was not violated.

The authorities cited by petitioner do not compel the conclusion that petitioner's sixth amendment rights were violated. United States v. Wingate, 520 F.2d 309 (2d Cir. 1975), was decided strictly on the basis of the fact that the issues at the pre-trial hearing and trial were not identical. The court does not appear to have considered the question whether the testimony at issue may have been relevant both at the hearing and at trial. Here, as respondent has urged, the testimony at issue was relevant to the issues at the voluntariness hearing as well as to issues raised at trial. Moreover, in Wingate, there was no opportunity for the government to make the inquiries at the pre-trial hearing. United States v. Atkins, supra, supports respondent's position. There, the opposing party had the opportunity, but not the motivation, to ask certain questions of the witness who later became unavailable. Here, petitioner had the opportunity and the motivation, but did not avail himself of that opportunity. In United States v. Zurosky, supra, as here, the inquiries were relevant at the voluntariness hearing; for some reason, defense counsel decided not to ask the questions.

Because of the rather peculiar things that happened prior to petitioner's trial, respondent suggests that this contention entitles petitioner to no relief because it does

not even constitute a sixth amendment claim. In any event, having had sufficient opportunity and motive to make the inquiries at the pre-trial hearing, petitioner cannot now claim a violation of his right of confrontation.

II

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN LAW ENFORCEMENT OFFICERS SEARCHED THE CAR THAT PETITIONER TOOK FROM HIS VICTIM, AND SEIZED VARIOUS ITEMS FROM THE CAR.

Petitioner contends, largely on the basis of this Court's holding in Robbins v. California, ____ U.S. ____, 101 S.Ct. 2841, ____ L.Ed.2d ____ (1981), that he had "standing" to contest the search of Leroy Grove's vehicle and to object to the admission, at trial, of certain items contained in that vehicle. For the first time, petitioner has specified the objects which he felt were inadmissible on the basis of a fourth amendment violation. (See Petition for Writ of Certiorari, page 14.) Nonetheless, given the facts of this case, respondent takes the position that the Arizona Supreme Court properly ruled that petitioner did not have a reasonable expectation of privacy in Leroy Groves vehicle.

When Detective Johnson, Salt Lake City Police Department, searched Grove's car on September 8, 1978, the day petitioner was arrested, his purpose was to ascertain ownership of the vehicle. This was Johnson's first contact with the vehicle; several items were removed at that time by Johnson and Detective Halterman. His only other contact with the car was on October 18, 1978, at which time he did not remove anything from the vehicle. He did not recall any other officer removing anything from the vehicle at that time. A search of a vehicle and its contents in order to ascertain the identity or the whereabouts of the

rightful owner is not improper. Waine v. State, 37 Md.App. 222, 377 A.2d 509 (1978).

As he did in the Arizona Supreme Court, petitioner places heavy reliance on Cotton v. United States, 371 F.2d 385 (9th Cir. 1967), and Simpson v. United States, 346 F.2d 291 (10th Cir. 1965). He now adds United States v. Jamerson, 549 F.2d 1263 (9th Cir. 1977). As the Arizona Supreme Court pointed out, this Court has characterized as "inexplicable" the holdings in Cotton and Simpson, in that they were apparently premised on a misinterpretation of certain language employed by this Court in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Rakas v. Illinois, 439 U.S. 128, 142 n.9, 99 S.Ct. 421, 429 n.9, 58 L.Ed.2d 387 (1978). Neither Cotton, Simpson, nor Jamerson supports petitioner's argument. Petitioner's statements that the search and seizure was "admittedly unconstitutional," and that he had "standing" to contest the admissibility of the items seized, are inaccurate. First, respondent has never conceded any impropriety in the officers' conduct. Second, in view of this Court's language in Rakas and its stated intent to eliminate the old "standing" concept in favor of substantive fourth amendment analysis, petitioner's statements make no sense.

With respect to petitioner's reliance upon Robbins, it is apparent that the officers in Robbins did not search the automobile, or even any of its contents, for the purpose of determining who owned the automobile. Indeed, ownership of the vehicle involved in Robbins was never an issue. Robbins does not appear to suggest that an individual can wrongfully take a car from its owner, and gain a reasonable expectation of privacy in the vehicle simply by driving it around the country for 6 weeks. In State v. Myers, 117

Ariz. 79, 570 P.2d 252 (1977), cert. denied, 435 U.S. 928 (1978), the Arizona Supreme Court held that a car thief has no reasonable expectation of privacy in a stolen vehicle. The Myers holding is not at variance with any case relied upon by petitioner. For these reasons, petitioner's fourth amendment assertions do not warrant an order granting the petition for writ of certiorari.

III

THE ARIZONA COURTS DID NOT FAIL TO CONSIDER MITIGATING EVIDENCE OFFERED BY PETITIONER.

Petitioner argues that the Arizona Supreme Court "disallowed consideration" by the sentencing authority of "doubt of guilt" as a mitigating circumstance. Petitioner's argument is premised on a misreading of the Arizona Supreme Court opinion, a misinterpretation of decisions handed down by this Court, and an apparent misapprehension of what happened in the trial court.

Respondent's reading of the Arizona Supreme Court's opinion discloses no suggestion that the court disallowed anything as a consideration in cases where the death penalty is available. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), this Court held that the sentencing authority could "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offenses that the defendant profers as a basis for a sentence less than death." 438 U.S. at 610, 98 S.Ct. at 2967 (emphasis original). Petitioner equates this language with a pronouncement that the sentencing authority must find mitigating circumstances from the evidence presented. That is clearly not what this Court said; indeed, common sense dictates that these two

concepts--"consideration" of possible mitigating evidence and "acceptance" of the evidence as valid mitigation--are two different things. The record is clear that petitioner presented evidence and argument relating to the "doubt of guilt" theory, including the testimony of the alternate juror. Pursuant to Lockett, it was a legitimate area of inquiry. However, the trial court was not constitutionally mandated to find, nor did it find, that this theory of mitigation rose to the level of a mitigating circumstance. Twelve jurors found, beyond a reasonable doubt, that petitioner committed the crime of murder in the first degree. The alternate juror, who never examined many of the exhibits introduced at trial, and who never had the opportunity to deliberate the matter with 11 other individuals, believed that the evidence was insufficient to warrant conviction. The trial judge disagreed. The Arizona Supreme Court, in its independent examination of the record, agreed with the trial court. Petitioner's exhortations to the contrary, both Arizona courts considered the proffered evidence. The fact that neither court found that the evidence constituted a mitigating circumstance does not violate the mandate of Lockett or any known constitutional precept.

IV

THE ARIZONA COURTS DID NOT FAIL TO CONSIDER EVIDENCE OFFERED BY PETITIONER, WHICH, HE ARGUED, SUGGESTED THAT CERTAIN AGGRAVATING CIRCUMSTANCES SHOULD NOT HAVE BEEN FOUND.

Petitioner's murder of Leroy Grove was not his first violent act. In 1968, he was convicted of second-degree murder. Both of petitioner's victims were strangled. He now claims that the Arizona courts failed to consider the extent or degree of proof upon which his prior conviction

was premised. This contention is separate from the one advanced in Argument III. Argument III deals with the alleged failure of the Arizona courts to consider evidence offered in mitigation of the offense; this argument involves the alleged failure of the state courts to consider evidence that might eliminate, or at least dilute, aggravating evidence proffered by the state. Even if Lockett applies to this situation, as opposed to a situation where the defendant is precluded from offering evidence in mitigation of the offense, petitioner again equates two distinct and unequal concepts. Petitioner was not foreclosed, by the trial court or the Arizona Supreme Court, from either presenting evidence with respect to his prior conviction or arguing that the prior conviction should not be found to constitute an aggravating circumstance. The fact that neither court agreed with petitioner's argument does not mean that he was foreclosed from making this argument.

V

THE ARIZONA COURTS DID NOT VIOLATE THE RIGHTS CONFERRED UPON PETITIONER BY THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

The short answer to petitioner's argument is that the Arizona death penalty statute was never held to be unconstitutional. Part of the statute was found to violate this Court's mandate in Lockett, but the Arizona Supreme Court held that that portion of the statute was severable from the rest. State v. Watson, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978). Thus, there was a valid death penalty statute in effect on August 1, 1978, when petitioner killed Leroy Grove. The argument that the Watson Court improperly "rewrote" the death penalty statute

totally disregards the severability concept as set forth in Watson and other decisions. Petitioner has not explained, nor does respondent understand, how the Arizona Supreme Court's holding in Watson violates anything this Court said in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

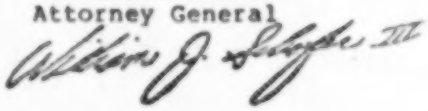
Lastly, the imposition of the death penalty does not violate petitioner's rights under the ex post facto clause of the United States Constitution. The Watson opinion was filed 12 days before petitioner committed his crime. Thus, in legal contemplation, he was on notice that the State of Arizona had the authority to seek the death penalty for persons convicted of first-degree murder. For this reason and those given above, neither the ex post facto clause, nor any of the decisions interpreting it, were violated here.

CONCLUSION

For the reasons stated, respondent respectfully requests this court to deny the petition for writ of certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



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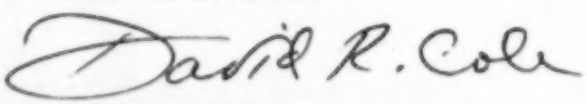

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

DAVID R. COLE, being first duly sworn upon oath, deposes and says:

That he served petitioner in the foregoing case by forwarding one (1) copy of RESPONDENT'S RESPONSE TO WRIT OF CERTIORARI; and also served the attorney for the petitioner in the foregoing case by forwarding two (2) copies of RESPONDENT'S RESPONSE TO WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

CHARLES A. SHAW
122 N. Cortez, Suite 300
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Attorney for PETITIONER

EDWARD HAROLD SCHAD, JR.
Box B-40496
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this 13th day of January, 1982.

David R. Cole
DAVID R. COLE

SUBSCRIBED AND SWORN to before me this 13th day of January, 1982.

Paula J. Haight
NOTARY PUBLIC

My Commission Expires:

May 17, 1983

PH-1709G